Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-706

ARBRY McCULLEY, Administrator of the Estate of Booker Clemons, Deceased,

Petitioner,

vs.

MITSUI O.S.K. LINES, LTD. and BABA-DAIKO SHOSEN, K.K.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit [Docket No. 78-1812] and decided on April 16, 1979 is reported at 596 F.2d 746, is reproduced verbatim at p. 1a of the appendix.

There is no opinion of the district court.

JURISDICTION

Jurisdiction of this appeal is based on Title 28 U.S.C. § 1254(1).

The judgment appealed from was entered on April 16, 1979. A copy of the order is set forth at p. 12a of the appendix.

A petition for rehearing was denied on July 3, 1979. A copy of that order is set forth at p. 13a of the appendix.

One application for extension of time was filed by petitioner, and leave was granted by Mr. Justice Stevens on September 21, 1979 to and including November 1, 1979 to file the instant petition for a writ of certiorari.

QUESTIONS PRESENTED

I. Is the stevedore's negligence in a third party action under § 905 of the Longshoremen's and Harbor Workers' Compensation Act a bar to plaintiff's recovery since the enactment of the 1972 Amendments, where there was evidence at trial that the vessel's crew had created the condition which caused the plaintiff's injuries,

and, if not,

II. Did the Court of Appeals erroneously enter a judgment notwithstanding the verdict for defendant on the ground there was *no* negligence which could be attributed to the vessel or its crew under the standards applicable since the abolition of the unseaworthiness doctrine in a longshoreman's action?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

Title 33 U.S.C. §§ 905 (a) and (b)
[Longshoremen's And Harbor Workers' Compensation Act]

§ 905. Exclusiveness of liability.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in pro-

viding stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263.

Title 29 C.F.R. § 1918.2,
[Occupational Safety And Health Regulations]

§ 1918.2 Scope and responsibility.

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1918.3(c).

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

Constitution Of The United States
Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner's decedent*, a longshoreman, brought suit for personal injuries sustained by him while employed by Transoceanic Terminals Corporation to perform stevedoring services aboard the M/V Mayasan Maru owned by Respondent Mitsui O. S. K. Lines, Ltd., and chartered by Respondent Baba-Daiko Shosen, K. K. Jurisdiction in the district court was based on diversity of citizenship, 28 U. S. C. § 1332 and concurrently on claims cognizable in admiralty, 28 U. S. C. § 1333.

The accident giving rise to this suit occurred on November 23, 1976 a few minutes past 7:00 p.m. Petitioner had been assigned by his employer to work in Hatch #4 of the M/V Mayasan Maru. There are four deep tanks in Hatch #4, the aft pair designated as A (port) and D (starboard) and the forward pair designated as B (port) and C (starboard). Petitioner was assigned to work in deep tank A. [Plaintiff's demonstrative exhibit 27, at trial]

During the afternoon of November 23, 1976, the longshoremen were discharging bales of wire from deep tanks A and D. Deep tanks B and C were empty. Not having completed the discharge of the cargo in deep tanks A and D at 6:00 p.m., the longshoremen, including Petitioner, were told to take a one hour dinner break and return at 7:00 p.m.

About 4:30 p.m. the stevedoring company's hatch boss, Mr. Albert Johnson, requested the duty officer of the

* Booker Clemons, the plaintiff below, died on June 21, 1979 and Arby McCulley was appointed Administrator of his estate. All references herein to "Petitioner" are to Booker Clemons, deceased.

vessel's crew to open the forward deep tanks so they could be worked *after* the supper break, *and after about 30-45 minutes more of unloading was completed in the aft tanks*. The crew opened the deep tanks during the supper break between 6 and 7 p.m. and did not rig any safety lines or net around the open, unguarded 20 × 20 foot tanks in the bottom of the lower hold. Johnson testified it would have taken about three to five minutes to rig the line or net. Defendant never seriouly disputed that the crew opened the tanks. Indeed, its own witness, the stevedoring company's general manager, Paul Lopes, testified that if the longshoremen had opened the tanks it would have been reflected in the stevedore's records showing the vessel was charged for the service performed, but it had not been.

The evidence adduced at trial showed conclusively a custom that the crew rigs such ropes, guardrails or safety net around a deep tank which it is responsible for opening if no cargo is actually being loaded or unloaded. There was testimony that, if the stevedore opens the deep tanks, then it is charged with the responsibility of rigging the safety line or net. No argument was made at the trial by defendant-respondent that the safety custom was a local "Chicago Port custom", nor was any objection made at the trial that it was anything but an industry-wide custom as plaintiff contended.

Upon his return from dinner. petitioner climbed down the ladders from the top deck to the lower 'tween deck on his way back to deep tank A. He paused to check the progress of the men working in deep tank D by bending over and peering into the hold. Upon straightening up, he took a step backward for balance and fell backwards into the unguarded deep tank C, sustaining the injuries for which suit was brought.

The trial court instructed the jury on the standard of care owed to a longshoreman by a vessel. No objection to this instruction was interposed on behalf of Respondents. Indeed, both at the trial level and in the court of appeals, Respondent conceded that the standard of care instruction was proper. The jury was instructed that if the negligence of the plaintiff, the stevedoring company or any of its employees was the sole—the only—proximate cause of the accident then the plaintiff could not recover. [Transcript p. 666, accord Devitt & Blackmar, F. J. P., 3rd Ed. § 96.38]. The jury was also charged in accordance with F. J. P., 3rd Ed. § 96.41 that negligence of the Plaintiff's employer or fellow employees is not imputed to him. [Transcript pp. 667-8]. The case was submitted to the jury on a special verdict which found that Respondents were negligent, that this negligence proximately caused Petitioner's injuries and the Petitioner was contributorily negligent, apportioning his negligence at thirteen per cent (13%). The jury thus returned a verdict (without reduction for contributory negligence) for Petitioner in the amount of $322,000.00. Judgment was entered thereon on March 22, 1978.

Respondents then filed motions for judgment n.o.v. or for a new trial on the ground, *inter alia*, that the evidence was insufficient as a matter of law to sustain the jury's finding of negligence. Defendant also raised, for the first time, in his post-trial motion that the custom of rigging the safety line or net was a "local Chicago Port custom." These motions were denied by the trial court and Respondents perfected an appeal to the United States Court of Appeals for the Seventh Circuit. That court reversed the judgment of the trial court, with directions that "a new judgment" be entered for Respondents on the ground that a reasonable

jury could not find Respondents negligent "in the context of the 1972 amendments to the LHWCA." [p. 4a] Without any evidence in the trial record that the custom of rigging the net or line was esoteric or peculiar to Chicago, a panel of the Seventh Circuit accepted respondent's belated theory, and used as a supporting reason for reversal that liability could not be imposed on the vessel unless there was "evidence that the defendants were aware of or should have been aware of the local custom . . . [or] . . . evidence that in the circumstances the failure to rig a line was a departure from the alleged custom." [p. 10a].

On these facts, a panel of the Seventh Circuit Court of Appeals found "the behavior of the Stevedore belies *any possible inference* that the ship's crew was negligent." [p. 10a]. [emphasis added]. It also held "we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn . . . whether . . . *any negligence* could be attributed to these defendants." [p. 4a] [emphasis added]. Finally, in footnote 9 of its opinion [p. 6a] the panel of the Seventh Circuit held ". . . there was no evidence from which the jury could have properly concluded that the vessel's crew was negligent." [p. 6a].

REASONS WHY THE WRIT SHOULD BE GRANTED

The federal law of negligence under § 905 of the Longshoremen's and Harbor Workers' Compensation Act is not settled. If the opinion of the Seventh Circuit is allowed to stand it will frequently be cited as a poor precedent for finding a negligent vessel not liable virtually each time a longshoreman falls into an open, unguarded hatch or tank. This will thwart the Congressional purpose of the 1972 Amendments and Congress' intent that nothing in the amendments was intended "to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Here, the panel of the Seventh Circuit, per curiam, made glaringly erroneous assumptions, findings of fact and conclusions of law which defy even the most conservative circuits which have strictly applied §§ 343 and 343A of the Restatement of the Law, Torts, 2d, as the correct standard of care in a post-1972 claim.

Even a cursory reading of the per curiam opinion shows the effort the panel is exerting to search for a reason to reverse the plaintiff's verdict, when it is clear that the court below does not even understand when a prima facie case has been made out under the maritime law. Although the court held the plaintiff could not recover under the facts proved under the principles applicable to the 1972 Amendments, the court never once mentioned that the standard of care was not in issue, as the parties submitted the case on an agreed instruction in accordance with the §§ 343 and 343A approach which most of the circuits have applied in these cases, until recently.

Petitioner submits that, should the writ issue in the instant cause, the Supreme Court could pronounce that there is not necessarily one single correct standard of care under the 1972 Amendments to the LHWCA, but, rather, there should be established a general federal maritime law determined on a case by case basis. There may well be cases where, as here, the §§ 343-343A standard instructed to the jury would produce the same result if a pure "reasonable care under the circumstances" standard were applied. Petitioner asserts there may be more than one true standard which can be established to reconcile the opinions in the various circuits, and the instant case is one which can be justified as imposing liability on the vessel for negligence under any already recognized theory of liability, since the enactment of the 1972 Amendments to the Act. The Supreme Court is ready to hear a case involving the standard of ca e, after eight years of conflicts in the circuits.

By granting the writ, the Supreme Court will now come to grips with the issue whether §§ 343 and 343A of the Restatement of the Law, Torts, 2d, smuggles into admiralty law the expressly forbidden element of contributory negligence and assumption of risk as a bar to plaintiff's recovery. If the petition for a writ of certiorari is granted in this case, a reversal of the Court of Appeals for the Seventh Circuit is almost certain, and these questions will be resolved for many cases in the future, avoiding much more obfuscation for trial and appellate courts in this recurring problem which is not likely to heal itself.

I. This court should settle the law under § 905(a) and (b) of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act whether contributory negligence of a longshoreman and his employer should be a complete bar to a plaintiff's recovery, where a trial court and jury find negligence on the vessel's part in creating the condition which causes a plaintiff's injury.

II. The opinion of the Seventh Circuit is in direct conflict with the opinion of the Ninth Circuit which is presently before the Supreme Court on petition for writ of certiorari, [*Bachtel v. Mammouth Bulk Carriers, Ltd.* No. 79-538], and the opinions of the Second, Third, and Fifth Circuits.

III. The Seventh Circuit has decided an important question of federal law which dehors the general trend of decisions in longshoremen's actions since the 1972 Amendments to the LHWCA, and redecided the facts to reach a conclusion contrary to the trial court's and jury's, unduly narrowing what constitutes "negligence" within the meaning of a post-1972 claim for personal injuries, which decision could affect an inordinately large number of cases in the future.

ARGUMENT

Most of the courts which have considered longshoremen's actions for personal injuries since the 1972 Amendments to the LHWCA have held the vessel liable where the crew participated in creating the condition causing injury to the longshoreman, or where the vessel knew or should have known of an unreasonably dangerous condition which was likely to cause the injury complained of. The word "negligence" is not defined in § 905.

The Seventh Circuit Court of Appeals has disregarded a jury's special verdict that there was negligence on the vessel's part, and entered a judgment for defendant notwithstanding the verdict for plaintiff in the amount of $322,000.00. Many longshoremen will be adversely affected by this anomalous ruling because the vessel owners will endeavor to cite *Clemons* every time a longshoreman falls into an open, unguarded hatch for the proposition that such a condition is open and obvious as a matter of law. A mere reading of the opinion of the court of appeals indicates how the panel of the Seventh Circuit apparently searched the record for reasons to reverse, and how it apparently misapprehended the basic body of law developed after 1972.

The conflict centers about erroneously adopted notions of the Seventh Circuit that there is language in the LHWCA and the Congressional Committee Reports of the 1972 Amendments to the Act that the "stevedore is statutorily charged with the primary responsibility of the safety of the longshoreman," despite the fact that nowhere is such a simplistic formula found in the Act, the OSHA regulation or the Congressional Reports of the Senate and House Committees.

The Seventh Circuit in its opinion [p. 10a] unequivocally decides "The Stevedore [sic], statutorily charged with the primary responsibility for its employees, did not ask the ship's crew to rig a safety line at the time it requested . . . the tanks . . . to be opened or after plaintiff's accident." There is not one word in the LHWCA or in the House or Senate Committee Report Notes which defines the vessel's or the stevedore's responsibility as primary. Indeed, the advice of the House and Senate Reports is to the contrary, i.e.: ". . . Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." [Senate Report of the Labor and Public Welfare Committee, No. 92-1125, September 14, 1972].

The United States Court of Appeals for the Ninth Circuit has recently decided *Santos v. Scindia Steam Navigation Company*, 598 F.2d 480 and *Bachtel v. Mammouth Bulk Carriers, Ltd.*, ... F.2d ....., (C.A., 9th Cir.), Aug. 20, 1979, No. 77-3645. In those cases, the Ninth Circuit held that a vessel had the duty to exercise reasonable care under the circumstances to protect a longshoreman from injury. This was in accord with the admiralty concept of "negligence" found in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). In those cases, verdicts for plaintiffs were upheld. In both *Santos* and *Bachtel*, [numbers 79-512 and 79-538 on petitions for certiorari] the questions presented are identical, and in direct conflict with the decision below here.

Attempts by courts, both at the trial and appeal level, to define responsibility as "primary" on the stevedore have resulted in a sharp conflict in the circuits over

what the standard of care is. The Supreme Court should grant the writ in this important case because the Congress intended the courts to develop a uniform federal body of admiralty negligence law consistent with its intent to eradicate the unseaworthiness doctrine in longshoremen's cases.

The Seventh Circuit unequivocally held ". . . the behavior of the Stevedore belies any possible inference that the ship's crew was negligent." [p. 10a]. How such a result is possible where there was undisputed evidence that the crew had opened the deep tank into which plaintiff fell, and it was clear that the crew did not rig the safety line around the tank awaiting to be worked that night, flies in the face of *any* reasonable standard to be applied in a longshoreman's negligence action, whether under the standards of §§ 343 and 343A of the Restatement of the Law, Torts II, or under the reasonable care under the circumstances standard adopted by the Ninth Circuit in *Santos* and *Bachtel*, or the pre-1972 negligence standard of *Kermarec*.

This misconception in the Seventh Circuit, and in others, has created a plethora of litigation and irreconcilable decisions throughout the various circuits, and the time is propitious that the Supreme Court settle the law to avoid further confusion.

Shortly after the court of appeals' decision in this matter, this Court rendered its decision in *Edmonds v. Compagnie Generale Transatlantique*, ... U.S. ....., 99 S. Ct. 2753 (1979), where it was held that, under 33 U. S. C. § 905(b), a "longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore . . . is partly to blame." ..... U.S. at ....., 99 S. Ct. at 2758. This Court further indicated that

damages were to be assessed without regard to any benefits plaintiff may have received under the Longshoremen's and Harbor Workers' Compensation Act. ..... U.S. at ....., 99 S. Ct. at 2761.

Although, of course, the Seventh Circuit cannot be charged with clairvoyance in predicting the ultimate decision in *Edmonds*, its decision and its view of the evidence are inconsistent with *Edmonds*. The court below charged Petitioner's employer with negligence in failing to rig a safety line. However, the record reveals that there was an industry-wide custom placing responsibility for rigging safety lines on those persons who opened the tanks. Here, it is undisputed that the ship's crew actually opened the tanks. Thus, the duty to rig such lines was on the vessel and the failure to do so would, as the jury found, constitute negligence. Under *Edmonds*, this "concurrent" negligence would not defeat Petitioner's recovery. Similarly, the rule in other circuits has been that liability will be imposed on the vessel where, as here, the evidence establishes that the vessel's crew actively participated in creating the condition which caused the injuries complained of. *See Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978); *Butler v. O/Y Finnlines, Ltd.*, 537 F.2d 1205 (4th Cir. 1976). *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978), *Napoli v. Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976).

Yet the court of appeals found that Respondent had no knowledge of the custom in question, referring to it as a local, Port of Chicago custom. This, it is respectfully submitted, is not borne out by the record and affords an additional reason why certiorari should be granted. The first time any reference was made by Respondents to the fact that the custom testified to at trial was a local

custom was on appeal. No issue or argument was made at trial by defendant-respondent that the custom was anything other than an industry-wide custom. Under the circumstances, the court of appeals had no jurisdiction to decide this question. As stated in *McCandless v. Furland*, 293 U.S. 67, 74 (1934), a defect found in the record should not defeat recovery where it could have been objected to at trial. Accord, *United States v. Atkinson*, 297 U.S. 157, 159 (1936).

Thus, the court below failed to recognize one of the basic tenets of appellate review, that the reviewing court is to be concerned only with the record as it existed for the trial court. *See, e.g., In re Stolkin*, 471 F.2d 1331 (7th Cir. 1973).

The trial record is simply devoid of any evidence which can reasonably be interpreted as limiting the custom of rigging safety lines to the Port of Chicago. Merely because there is no O.S.H.A. regulation covering this point does not militate against it. Indeed, the O.S.H.A. regulations themselves, 29 C.F.R. § 1918.2(b), reproduced in full, *supra*, clearly indicate that vessel owners are not to be relieved of responsibility placed upon them by custom. This is made clear by the decision of the Ninth Circuit Court of Appeals in *Bachtel v. Mammouth Bulk Carriers, Ltd.*, ... F.2d ..... (9th Cir. August 20, 1979) Cases such as *Chavis v. Finnlines, Ltd. O/Y*, 576 F.2d 1072 (4th Cir. 1978), and *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), relied upon by the court below do not represent the proper interpretation of the O.S.H.A. regulations as they affect a vessel owner's liability to a longshoreman. And, it will also be noted that it was not the intent of Congress, in amending the Longshoremen's and Harbor Workers' Act, to have different standards apply in

different ports. See H.R. Rep. No. 92-1441, 3 [1972] *U.S. Code Cong. & Ad. News* 4698, 4705.

This Court has never considered the effect of custom on a vessel's liability under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905. Nor has this Court ever considered the scope and meaning of 29 C.F.R. § 1918.2(b). These are important and undoubtedly recurring questions which will shape the future course of litigation under the Act and must be decided by this Court to ensure the uniformity of decisions contemplated by the Congress when it passed the amendments to the Act in 1972. Further, an important question concerning the scope of review is presented by reason of the fact that the court below considered matters not raised, argued or objected to at the trial of this cause.

Cases such as *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1978), *Cox v. Flota Mercante Grancolombiana*, 577 F.2d 798 (2d Cir. 1978), *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3rd Cir. 1977), and *Chavis v. Finnlines, Ltd.*,* *supra*, are all clearly distinguishable on their facts, because in each of those

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* In *Chavis v. Finnlines, Ltd.*, the court of appeals searched the record to affirm a jury's verdict for defendant, and rightly so, for, there, there was seriously conflicting evidence whether the plaintiff even injured his back at all on the ship. The *Clemons* court adopted the statement in *Chavis* that "the primary responsibility for the safety of the longshoremen is on the stevedore" is yet a quotation from *another* case, *Brown v. Rederi*, 545 F.2d 854 (3rd Cir. 1976). Nowhere in the House or Senate Reports of the LHWCA can such a categorical statement be found. It is legally misleading, and has been adopted by some courts to justify a conclusion. However, even *Chavis* recognizes "it does not appear, in all cases, the obligation is exclusively his [the stevedore's]." at p. 1078. The Seventh Circuit panel failed to make this distinction in the present case, or overlooked the point completely.

cases the condition causing the plaintiff's injuries was unknown or unexplained [e.g. *Cox*] or was created by the stevedoring company during longshoring operations [e.g. *Chavis* and *Hurst*]. This is not the situation in the case sub judice, as there was substantial evidence at trial that the vessel had created the condition which injured the plaintiff. Whether a given practice of an industry is negligent is to be determined by a jury, and not by the industry which practices it. *Rodriguez v. Compass Shipping Co., Ltd.*, 456 F. Supp. 1014 (2d Cir. 1978).

It is obvious that the panel of the Seventh Circuit believed the stevedoring company was responsible for the plaintiff's safety, even though the vessel was negligent in preparing the tanks for operations. This is also contrary to the rule in *Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484 (9th Cir. 1978). The jury resolved any disputed questions in favor of plaintiff, and the reversal by the Court of Appeals conflicted with the Seventh Amendment by their action. *Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108 (1962), *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364.

RELATED CASES

The questions raised in this case are related to those raised in the following pending petitions for writ of certiorari:

Scindia Steam Navigation Co. v. Santos, No. 79-512;

Mammouth Bulk Carriers, Ltd. v. Bachtel, No. 79-538; and

Ernst Russ Steamship Company v. John Matthews, No. 79-624.

CONCLUSION

Petitioner asks that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision of the court.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1812

BOOKER CLEMONS,

Plaintiff-Appellee,

v.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 76-C-4639—**Stanley J. Roszkowski**, *Judge.*

HEARD JANUARY 24, 1979—DECIDED APRIL 16, 1979

Before CUMMINGS, *Circuit Judge*, MARKEY, *Judge*,* and TONE, *Circuit Judge.*

PER CURIAM. In this suit for recovery of damages for personal injury, the amended complaint was, as plaintiff puts it, "concurrently based upon diversity of citizenship [28 U.S.C. § 1332] and * * * cognizable in admiralty [28

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* Honorable Howard Thomas Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.

U.S.C. § 1333]."[1] Plaintiff sought $250,000 from the owners of M/V MAYASAN MARU and from co-defendant Baba-Daiko Shosen, K.K., the charterer of the vessel. The amended complaint showed that plaintiff was employed as a longshoreman by Transoceanic Terminals Corporation ("Stevedore"), a stevedoring company, to unload cargo from the M/V MAYASAN MARU in Chicago, Illinois, when he stepped backwards "over an open hatch, causing him to plummet approximately eighteen (18) feet below into a tank." His ensuing injuries were said to have been caused by defendants' failure to provide a safety line or net about the hatch.

At the jury trial, the evidence showed that on November 23, 1976, plaintiff was performing stevedoring services aboard the MAYASAN MARU under contract between the Stevedore and the defendants. He was 66 years old, largely retired, and had 14 years' experience in his trade. He was assigned to work in Hatch No. 4 containing four deep tanks. The aft pair consisted of tanks A and D; the forward pair were designated B and C. Each pair had a common cover and was about 20′ deep and 20′ wide. He was directed to work in tank A. During the afternoon of November 23, he and his fellow longshoremen were discharging bales of wire from that tank and tank D, the other aft tank. This work had not been finished when they stopped for supper at 6:00 PM. They were to return to work at 7:00 PM.

About 4:30 PM that afternoon, a supervisory employee of the Stevedore, identified only as "George," told foreman Albert Johnson, also an employee of the Stevedore, that the longshoremen would load empty tanks B and C after supper and therefore to have the

[1] Plaintiff's brief 2. However, again according to plaintiff's counsel, the case was tried solely on the theory of defendants' negligence; no concept of unseaworthiness was presented to the jury (Br. 6). The vessel's liability to longshoremen on account of unseaworthy conditions was specifically eliminated by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 905(b).

crew open them before then. Consequently, Johnson told a member of the ship's crew to open those tanks between 6:00 PM and 7:00 PM and he did so. A few minutes after 7:00 PM, on returning from his supper break, plaintiff fell backwards into tank C while on his way back to his station in tank A. On his way to tank A, plaintiff had decided to peek into its companion aft tank D to see how the longshoremen who had returned to work ahead of him were doing. Plaintiff testified that thereafter:

> "When I straightened up from peeping in D, I stepped backwards. From looking over here, I must have stepped over a little too far. I stepped right over here in C, this open hole right here * * *." (App. 120.)

At 7:35 PM, the Stevedore employee named George decided that tanks B and C should not be loaded until the following morning. Until then, the ship's crew had still expected tanks B and C to be worked that evening.

After remaining unconscious at the bottom of tank C, plaintiff climbed three sets of ladders to the deck of the ship and reported the incident to Johnson. Plaintiff was then hospitalized for ten days at South Shore Community Hospital where he was diagnosed as having "[m]ild cerebral concussion; superficial laceration of the scalp; contusion, right knee and foot; acute cervical strain; degenerative disease of the thorocolumbar spine and both knees" (Plaintiff's Exhibit 3). His medical expenses totaled approximately $4,000 (Plaintiff's Exhibit 1).

The jury found that plaintiff's contributory negligence was 13% responsible for his fall but entered a verdict of $322,000 for him, and the trial court entered judgment on the verdict for that sum less 13%. Defendants filed a motion for judgment n.o.v. or, in the alternative, for a new trial. After considering defendants' post-trial briefs, the motions were denied, resulting in the filing of this appeal. We reverse on the ground that the motion for judgment notwithstanding the verdict should have been granted.

It is true that a court should sparingly enter judgments n.o.v. As Judge Hastings pointed out in *Hohmann v. Packard Instrument Company, Inc.*, 471 F.2d 815, 819 (7th Cir. 1973), a motion for judgment notwithstanding the verdict or for a directed verdict "should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion, is such that reasonable men in a fair and impartial exercise of their judgment may reach different conclusions" (citations omitted). In the present case, we firmly conclude that the evidence is of insufficient probative value for jurors fairly and impartially to differ as to the inferences to be reasonably drawn on the question of whether in the context of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, any negligence could be attributed to these defendants. Consequently, it was error to deny the judgment n.o.v. Wright and Miller, *Federal Practice and Procedure* § 2524; 5A Moore's *Federal Practice* ¶ 50.02[1].

Under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended in 1972 (33 U.S.C. §§ 901, *et seq.*), Congress placed a longshoreman injured on board a vessel in the same general position as if injured in non-maritime employment ashore, concluding that the major responsibility for the proper and safe conduct of the work is to be borne by the Stevedore, from whom this plaintiff apparently has already recovered workmen's compensation under the Act. Responsibility for the longshoremen's safety was focused on those best able to improve it, the stevedores.[2]

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[2] The Occupational and Safety Health Administration (OSHA) regulations establish the standard of care to which the stevedores are held responsible. Although these regulations require numerous specific safety measures, they do not impose even on the Stevedore the duty of running lines between open deep tanks. See 29 C.F.R. §§ 1918.31(e) and 1918.35. If plaintiff had proved that his accident occurred from poor lighting on the ship, the OSHA regulations would place that responsibility on the Stevedore rather than the shipowners. 29 C.F.R. §§ 1918.2 and 1918.92.

Although the shipowner retains the legal duty to exercise ordinary care to keep the premises in a condition reasonably safe for use by the longshoremen, negligence of the shipowners must now be based on negligence principles applicable to land-based activities in non-maritime pursuits. *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4th Cir. 1978). As a result of the amendments to the Act, a vessel owner is to be judged by the same standard of care as a land owner to a business invitee, such as embodied in Sections 343 and 343A of the Restatement of Torts (2d) (1965).[3]

The 1972 amendments substantially increased the benefits payable under workmen's compensation secured by the longshoreman's employer[4] but made the shipowner liable only for negligence attributable to the vessel, rather than—as had previously been the case—for any unseaworthy condition. The amendments also eliminated the shipowner's third-party action against the longshoreman's employer, in the event the shipowner is held liable for negligence.[5] The House Report accompanying the 1972 amendments makes clear that whether the vessel was negligent is to be determined primarily by established principles of land-based tort law,[6] that the primary responsibility for the safety of the longshoremen rests with the employer,[7] and that the shipowner is not to be held liable for the negligence of

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[3] *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976), and *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976).

[4] The employer is usually a stevedoring company or a shipyard.

[5] For detailed explanations of the development of the law in this area and the difficulties that gave rise to the new compromise reflected in the 1972 amendments, see *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1242-1244 (3d Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd., supra*, 1235-1236.

[6] H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 3 [1972] U.S. Code Cong. & Ad. News 4698, 4703.

[7] *Id.* at 4699.

the employer.[8] The five Circuits that have considered the question of what standard determines the shipowner's liability under the 1972 amendments have agreed that the shipowner will not be liable if the employer knew (or should have known) of the dangerous condition and nevertheless continued working the longshoremen unless the shipowner knew of special circumstances which would compel the longshoremen to continue to encounter an open and obvious danger which the shipowner was (or should have been) aware of and could have alleviated. *Cox v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 798 (2d Cir. 1978);[9] *Hurst v. Triad Shipping Co., supra*;[10] *Chavis v. Finnlines, Ltd., supra*, and *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir.

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[8] *Id.* at 4703, 4704. The non-liability of the shipowner for the employer's negligence is made explicit in the statute. 33 U.S.C. § 905(b).

[9] The jury verdict for the plaintiff was reversed on appeal because the responsibility for seeing that hatch covers were locked in place was the employer's, although it was the job of the vessel's crew to execute the task and it had been asked to do so. Earlier Second Circuit cases holding the shipowner liable are distinguishable on the ground that the ship's officer affirmatively participated in the decision that the longshoremen should continue working despite his knowledge of the dangerous condition (*Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364 (2d Cir. 1978)) or that the vessel operated as its own stevedore, and therefore was the plaintiff's employer (*Napoli v. Hellenic Lines, supra*).

However, in the most recent Second Circuit case of *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), another panel disagreed with the approach taken in *Cox, supra*, and held the shipowner liable for the negligent act of the vessel's crew even though the employer had responsibility for maintaining safe conditions. Judge Friendly wrote a strong dissent. While it is not clear which approach should properly be attributed to the Second Circuit, in the present case the result would be the same regardless of whether the *Cox* or *Canizzo* standard applied because, as explained *infra*, there was no evidence from which the jury could have properly concluded that the vessel's crew was negligent.

[10] A directed verdict for defendant was affirmed because there was no evidence to rebut the shipowner's denial of knowledge of the dangerous condition.

1977);[11] *Gay v. Ocean Transport & Trading, Ltd., supra;*[12] *Westcott v. Impresas Armadoras, S.A. Panama,* 564 F.2d 875 (9th Cir. 1977).[13] We agree with the approach taken in those cases and conclude that on the facts of the present case, the plaintiff cannot recover.

Here both the plaintiff and his employer knew that B and C tanks were open and unguarded. After plaintiff reported his fall,[14] his foreman testified that he could see that tank C was open and unguarded when he looked down from the upper deck into the lower hold.[15] Under earlier tort law principles, the fact that the open condition should have been apparent to plaintiff would have precluded his recovery, but the Restatement of Torts creates an exception where the possessor of land (here the possessor of the ship) "should anticipate the harm

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[11] Jury verdicts for defendants were upheld on appeal and instructions were approved that stated (1) the shipowner is liable only for hidden dangers which were unknown to the employer in the exercise of ordinary care or (2) the shipowner is not liable for open and obvious dangerous conditions if the employer could have been expected to correct them.

[12] Judgment for defendant shipowner in bench trial was affirmed when the hazard was readily apparent to the employer, even though the shipowner also knew of the danger.

[13] Judgment was ordered for defendant shipowner notwithstanding the jury verdict for plaintiff when the operations were within the employer's control and the shipowner was not aware of the danger.

[14] Although he testified that he stepped backwards into tank C, plaintiff told Johnson he had missed a step on a ladder (App. 192).

[15] Johnson testified that this was the first time he became aware that B and C tanks were open. However, since Johnson at his supervisor's direction had instructed the ship's crew to open those tanks during the supper hour, he and George, his supervisor, must have expected that the crew had followed his directions. Since he had also told the vessel's duty officer that the tanks were to be loaded after supper, Johnson must have expected that no safety line would be rigged because by his own testimony this would not be done if the tanks were to be worked. He did not instruct the vessel's crew to rig a safety line around these tanks either before or after plaintiff's fall.

despite a known or obvious dangerous condition." *Napoli v. Hellenic Lines, Ltd., supra* at 508; Restatement of Torts (2d) § 343A; Prosser, *The Law of Torts* § 61 (4th ed. 1971).[16] Here there was no evidence that defendants should have anticipated that plaintiff, a longtime longshoreman, would be unable to avoid falling backwards into tank C. Since an open tank is a condition routinely encountered by longshoremen, there was no reason to anticipate that anyone would be harmed by it. Therefore the exception in Section 343A is inapplicable.[17] *Stanley v. United States*, 476 F.2d 606, 609 n. 5 (1st Cir. 1973). As in *Stanley*, there is no evidence that defendants should have supposed that the Stevedore would employ careless workers on this job or fail in its obligations to take any needed safety precautions. Therefore, the *Stanley* court, with which we agree, refused to apply the exception embodied in Section 343A.

In addition, in the present case the Stevedore was responsible for the hazard both because it requested the

[16] *Arguendo* we are assuming that the exception in Section 343A is the proper standard, but we do not decide that question. The Circuits are divided on the question of whether Section 343A applies when the dangerous condition was either created by or known to the employer. Compare *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (5th Cir. 1977), and *Canizzo v. Farrell Lines*, 579 F.2d 682 (2d Cir. 1978), with *Cox v. Flora Mercante Grancolombiana*, 577 F.2d 798 (2d Cir. 1978); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir. 1977); *Chavis v. Finnlines, Ltd.*, 576 F.2d 1072 (4th Cir. 1978); and *Westcott v. Impresas Armadoras, S.A. Panama*, 564 F.2d 875 (9th Cir. 1977).

[17] Plaintiff suggests that application of the Restatement of Torts doctrine is tantamount to raising the defenses of contributory negligence or assumption of the risk, and that these defenses are contrary to the intention expressed in the House Report that the maritime concept of comparative fault is to be applied (H. R. Rep. No. 92-1441, *supra*, at 4705). However, we read Section 343 together with Section 343A not as providing defenses but as defining when it is negligent to allow the existence of a dangerous condition. Under the Restatement, when the danger is open and obvious and in addition is avoidable in the exercise of ordinary care and therefore the harm is not foreseeable, it is not negligent to allow the danger to exist.

tanks to be opened and because, knowing they were open, it was charged by the Act with seeing to the safety of the longshoremen. After 4:30 PM, the Stevedore instructed the ship's crew to open tanks B and C between 6:00 and 7:00 PM because the longshoremen would be working there after their 7:00 PM return from supper. The undisputed evidence showed that, as plaintiff himself testified, in accord with the usual industry practice, no safety line would be placed around tanks being worked (App. 154). As the Stevedore's General Manager Paul Lopes testified, such a line would create a hazard to the longshoremen who would have to go under it (App. 332).

Plaintiff relies on a Chicago port custom that a safety line should be erected around an open deep tank. There is no evidence that this custom was known to defendants.[18] Moreover, the uncontroverted evidence is that this custom applies only to tanks in which no one is to be working. When this accident occurred a few minutes after 7:00 PM, tank C was to be worked that evening. It was not until 7:35 PM that the Stevedore employee named George countermanded his previous order. Indeed the only reason foreman Johnson had ordered the ship's crew to open tank C was to enable it to be worked that evening. Johnson's testimony evidenced what the ship's crew was told and what the custom of stringing safety lines consisted of. He said that he told the ship's duty officer to open the B and C tanks during the supper break because the longshoremen would be working there when they returned (App. 186, 200). By Johnson's own unequivocal testimony, the custom was that no safety lines should be rigged when the longshoremen were working a tank (App. 201), so that if the crew believed the men would be working B and C tanks, the crew would not be expected to rig a line. Johnson consistently testified that if open tanks were not to be worked for some time, a

[18] The deposition testimony of officer Aoshima does not acknowledge the custom described by Johnson. Mr. Aoshima, speaking through an interpreter, merely stated that he believed that all appropriate safety precautions had been taken (App. 227).

safety line would be rigged (App. 201). There was no evidence that the defendants were aware of or should have been aware of the local custom, nor was there evidence that in the circumstances the failure to rig a line was a departure from the alleged custom.

Additionally, the behavior of the Stevedore belies any possible inference that the ship's crew was negligent. The majority of the longshoremen who were working in the same hatch as plaintiff had returned to work before him, without complaint of the failure to rig lines around the open tanks. The Stevedore, statutorily charged with the primary responsibility for its employees, did not ask the ship's crew to rig a safety line at the time it requested tanks B and C to be opened or after plaintiff's accident. The longshoremen continued to work with all four tanks open and no safety lines around them during the evening after plaintiff's fall and throughout the following day (App. 33). Therefore, the evidence was insufficient to support a verdict for the plaintiff. Even if the absence of a safety line in these circumstances could be considered negligent, the negligence was not shown to be, in the context of the Act, chargeable to the defendants rather than to the Stevedore.

As seen (notes 9-13 *supra*), the pertinent case law is in accord with the undisputed evidence in this case. In addition, *Long v. Silver Lines, Ltd.*, 48 F.2d 15 (2d Cir. 1931); *Miller v. The Sultana*, 176 F.2d 203 (2d Cir. 1949); *Ove Tysko v. Royal Mail Steam Packet Company*, 81 F.2d 860 (9th Cir. 1936), specifically hold that it is not negligent for a hatch to be left open in anticipation of the commencement of cargo work. The authority of these cases has remained undiminished. In fact, plaintiff admits that general maritime law is pertinent and that cases decided on the basis of standards of maritime negligence prior to the 1972 amendments to the Longshoremen's Compensation Act are still viable precedents (Br. 10). In view of our holding that a reasonable jury could not find that this accident was caused by defendants' negligence, it is unnecessary for us to consider other errors claimed by defendants.

The judgment is reversed with directions to enter a new judgment in favor of defendants.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

PER CURIAM OPINION

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

April 16, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HOWARD T. MARKEY, *Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

BOOKER CLEMONS,

Plaintiff-Appellee,

No. 78-1812 vs.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4639 — STANLEY J. ROSZKOWSKI, *Judge*.

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, WITH DIRECTIONS, in accordance with the opinion of this court filed this date.

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* Honorable Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

July 3, 1979

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HOWARD T. MARKEY, *Judge**
Hon. PHILIP W. TONE, *Circuit Judge*

BOOKER CLEMONS,

Plaintiff-Appellee,

No. 78-1812 vs.

MITSUI O.S.K. LINES, LTD. and
BABA-DAIKO SHOSEN, K.K.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-4639 — STANLEY J. ROSZKOWSKI, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee Booker Clemons, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, is sitting by designation.